

Indiana Election Commission

Minutes

SEPTEMBER 22, 2004

Members Present: Brian L. Burdick, Chairman of the Indiana Election Commission (the Commission); S. Anthony Long, Vice Chairman of the Commission; John Chavis, Proxy for Butch Morgan; Thomas E. John, member of the Commission; Mitch Roob, Proxy for Brian L. Burdick.

Members Absent: Butch Morgan

Staff Attending: J. Bradley King, Co-Director, Indiana Election Division of the Office of the Indiana Secretary of State (Election Division); Kristi Robertson, Co-Director of the Election Division; Dale Simmons, Co-General Counsel of the Election Division, Lori Hershberger, Special Projects Coordinator, Election Division, Michelle Brzycki, Special Projects Coordinator, Election Division.

Also Attending: Maureen Bard, Legislative Services Agency; Tory Callaghan Castor (Election Systems & Software [ES&S]); Jay Golder, Anheiser-Busch; John Groh, (ES&S); Vicky Keramida; Dennis Lee (Bingham McHale); Troy Liggett; The Hon. Sue Anne Lower, Wayne County Circuit Court Clerk; Toby McClamroch (Bingham McHale); Nancy S. Miller (for Standard Management Corporation); Marilyn A. Moores (Cohen & Malad, LLP); Bill Moreau, Jr. (Barnes & Thornburg, for Anheiser-Busch); Dan Parker, Indiana Democratic Party; Marion Redstone; Peter J. Rusthoven (Barnes & Thornburg, for Anheiser Busch); Darrell Smith, *Connersville News-Examiner*; Michele Soliday, *The Indianapolis Star*; Dan L. Strahl; (for Keramida Environmental, Inc.); Mark Stratton, Legislative Services Agency.

1. Call to Order

The Chair called the September 22, 2004 meeting of the Commission to order at 1:16 p.m. at the Indiana Government Center South, Conference Center, Training Center Room 5, 302 West Washington Street, Indianapolis, Indiana. He noted that proper notice of the meeting had been given, as required by state law, and that three members were currently present with a fourth represented by a designated proxy. A copy of the meeting notice and agenda is incorporated by reference in these minutes. *[Copies of all documents incorporated by reference are available for public inspection and copying at the Election Division office.]*

The Chair introduced Mr. John Chavis, who was serving as proxy for Commission member Butch Morgan, pursuant to a proxy filed with the Election Division on this date. The Chair also introduced Mr. Mitch Roob, who would be serving as proxy for the Chair in certain campaign finance matters in which the Chair would recuse himself from consideration.

2. Approval of Minutes

The Chair noted that members had received copies of the August 26, 2004 Commission minutes and asked if there were additions or corrections. There being none, Mr. John moved, seconded by Mr. Long, that these minutes be approved as submitted. There being no further discussion, the Chair called the question, and declared that with four members voting “aye” (Mr. Burdick, Mr. Chavis, Mr. John, and Mr. Long), and no Commission member voting “no,” the motion was adopted.

3. Order 2004-126 (Approving Revised Forms)

The Chair recognized Ms. Robertson who noted that Commission members had received a copy of Order 2004-126. She indicated that by adopting this Order, the Commission would be approving Forms ABS-13 (Affidavit for Late Voter Registration by Absent Uniformed Services Voter; State Form 51263); and ABS-18 (Notice to Absentee Voter to Supply Additional Documentation; State Form 51631).

Ms. Robertson stated that the revisions of these forms were required by changes in state law, and to correct stylistic or technical errors. She noted that Form ABS-13 was to assist military voters who moved or were transferred to their current residence after the close of registration, but who were permitted to register to vote using a relatively new state law. She indicated that Form ABS-18 had been revised to reflect a change in state law that permitted a voter to file additional documentation until the close of polls on election day, rather than by noon on election day under former law.

The Chair asked if there were any questions for Ms. Robertson regarding this Order. There being none, Mr. John moved, seconded by Mr. Long, that Order 2004-126 be approved as submitted. There being no further discussion, the Chair called the question, and declared that with four members voting “aye” (Mr. Burdick, Mr. Chavis, Mr. John, and Mr. Long), and no Commission member voting “no,” the motion was adopted.

4. Campaign Finance Enforcement

A. Orders from the August 26, 2004 Commission meeting

The Chair noted that public hearings had been conducted on these matters at the August 26, 2004 Commission meeting under the Administrative Orders and Procedures Act (AOPA), which were documented in the minutes of that meeting. Proposed Orders 2004-47 through 2004-125 are incorporated by reference in these minutes.

The Chair indicated that, due to conflict of interest concerns, he would be recusing himself from voting on certain orders and that Mr. Roob would act as proxy for the Chair in his absence on the following specific proposed orders: Order 2004-64 involving respondent Safeco, Order 2004-65 involving the Paul Helmke Committee, Order 2004-98 involving the Indiana Electric Association PAC, Order 2004-104 involving Indiana Association of Homes

and Services for the Aging PAC, Order 2004-121 involving Contech Construction, Order 2004-122 involving Paul I. Cripe, Order 2004-123 involving The Linder Company, Order 1004-124 involving the Ace Mortgage Funding, Inc., and Order 2004-125 involving the Prairie Group.

The Chair indicated that, prior to recusing himself from the consideration of the orders he just listed, he would entertain a motion to adopt the remaining orders listed on the agenda for the campaign finance matters heard by the Commission at its August 26, 2004 meeting. Following review of these orders, Mr. Long moved, seconded by Mr. Chavis, that the orders listed below be approved as submitted. There being no further discussion, the Chair called the question, and declared that with four members voting “aye” (Mr. Burdick, Mr. Chavis, Mr. John, and Mr. Long), and no Commission member voting “no,” the motion was adopted and the following orders were approved:

- i. Order 2004-47: Imposing a Civil Penalty in Cause 04-5100-61 (Black for State Representative)
- ii. Order 2004-53: Imposing a Civil Penalty in Cause 04-1528-2 (Indiana Federation of Teachers Committee on Political Education)
- iii. Order 2004-54: Imposing a Civil Penalty in Cause 04-1587-3 (Johnson for State Senate Committee)
- iv. Order 2004-55: Imposing a Civil Penalty in Cause 04-1851-5 (Citizens for Gregg)
- v. Order 2004-56: Imposing a Civil Penalty in Cause 04-3265-6 (George Witwer for State Senate Committee)
- vi. Order 2004-57: Imposing a Civil Penalty in Cause 04-3766-9 (Birk for State Representative)
- vii. Order 2004-58: Imposing a Civil Penalty in Cause 04-3775-10 (Meijer Political Action Committee)
- viii. Order 2004-59: Imposing a Civil Penalty in Cause 04-3951-13 (Hoosiers for Witwer)
- ix. Order 2004-60: Imposing a Civil Penalty in Cause 04-3996-15 (Friends of Steve Johnson)
- x. Order 2004-61: Imposing a Civil Penalty in Cause 04-4096-17 (Mutual Insurance Companies Association of Indiana PAC)
- xi. Order 2004-62: Imposing a Civil Penalty in Cause 04-4277-18 (Opportunity Indiana PAC)
- xii. Order 2004-63: Imposing a Civil Penalty in Cause 04-4317-19 (Citizens for Patty Morgan)
- xiii. Order 2004-66: Imposing a Civil Penalty in Cause 04-4722-26 (Hoosiers for Kent Benson)
- xiv. Order 2004-67: Imposing a Civil Penalty in Cause 04-4733-27 (Friends of Earl Harris)
- xv. Order 2004-68: Imposing a Civil Penalty in Cause 04-4762-28 (Friends of Mike Wallin Committee)
- xvi. Order 2004-69: Imposing a Civil Penalty in Cause 04-4764-29 (Friends to Elect Jean Macdonald)
- xvii. Order 2004-70: Imposing a Civil Penalty in Cause 04-4769-31 (Good & Lawful Christian Men for John Anthony Malan State Representative)
- xviii. Order 2004-71: Imposing a Civil Penalty in Cause 04-4783-34 (Committee to Elect Larry Chubb)

- xix. Order 2004-72: Imposing a Civil Penalty in Cause 04-4792-35 (Sabbagh Election Committee)
- xx. Order 2004-73: Imposing a Civil Penalty in Cause 04-4811-36 (Phipps for State Senate)
- xxi. Order 2004-74: Imposing a Civil Penalty in Cause 04-4933-41 (Frugal Hoosiers for Mitch)
- xxii. Order 2004-76: Imposing a Civil Penalty in Cause 04-5012-44 (Thomas Keiser Exploratory Committee)
- xxiii. Order 2004-77: Imposing a Civil Penalty in Cause 04-5084-45 (Montelongo for State Senator)
- xxiv. Order 2004-78: Imposing a Civil Penalty in Cause 04-5086-47 (White for State Senator)
- xxv. Order 2004-79: Imposing a Civil Penalty in Cause 04-5090-51 (Citizens to Elect Jerry Baffa)
- xxvi. Order 2004-80: Imposing a Civil Penalty in Cause 04-5092-53 (Blacketor for State Representative Committee)
- xxvii. Order 2004-81: Imposing a Civil Penalty in Cause 04-5097-58 (Committee to Elect Phil Hoy)
- xxviii. Order 2004-82: Imposing a Civil Penalty in Cause 04-5099-60 (Gibson for State Representative Committee)
- xxix. Order 2004-83: Imposing a Civil Penalty in Cause 04-5185-63 (Bethany M. Hayes for State Representative)
- xxx. Order 2004-84: Imposing a Civil Penalty in Cause 04-5188-98 (Ballenger for State Representative)
- xxxi. Order 2004-85: Imposing a Civil Penalty in Cause 04-5190-99 (Garrett for State Representative)
- xxxii. Order 2004-86: Imposing a Civil Penalty in Cause 04-2082-65 (Indiana Third Congressional District Democratic Committee)
- xxxiii. Order 2004-87: Imposing a Civil Penalty in Cause 04-4695-66 (Republican 2nd District Central Committee)
- xxxiv. Order 2004-88: Imposing a Civil Penalty in Cause 04-119-67 (Teachers PAC of St. Joseph Valley)
- xxxv. Order 2004-89: Imposing a Civil Penalty in Cause 04-395-68 (United Mine Workers of American Coal Miners PAC)
- xxxvi. Order 2004-90: Imposing a Civil Penalty in Cause 04-886-70 (Beer Industry Political Action Committee)
- xxxvii. Order 2004-91: Imposing a Civil Penalty in Cause 04-1018-71 (Jeff Espich for State Representative)
- xxxviii. Order 2004-93: Imposing a Civil Penalty in Cause 04-1822-73 (Kokomo Firefighters Political Action Committee)
- xxxix. Order 2004-94: Imposing a Civil Penalty in Cause 04-1828-74 (International Chiropractors Association of Indiana)
- xl. Order 2004-95: Imposing a Civil Penalty in Cause 04-3174-75 (Plumbing-Heating-Cooling Contractors Political Action Committee)
- xli. Order 2004-96: Imposing a Civil Penalty in Cause 04-3436-76 (Indiana Defense Lawyers PAC)
- xlii. Order 2004-97: Imposing a Civil Penalty in Cause 04-3973-77 (Indiana McDonald's Operator PAC)
- xliii. Order 2004-99: Imposing a Civil Penalty in Cause 04-4278-79 (5th District Democratic Central Committee)
- xliv. Order 2004-101: Imposing a Civil Penalty in Cause 04-4359-81 (Valparaiso Firefighters PAC)

- xliv. Order 2004-102: Imposing a Civil Penalty in Cause 04-4404-82 (Sierra Club PAC)
- xlvi. Order 2004-103: Imposing a Civil Penalty in Cause 04-4409-83 (Greater Indianapolis Democratic Committee)
- xlvii. Order 2004-105: Imposing a Civil Penalty in Cause 04-4472-85 (Hoosiers Against Crazy Taxes)
- xlvi. Order 2004-106: Imposing a Civil Penalty in Cause 04-4568-86 (Indiana's Finest Political Action Committee)
- xliv. Order 2004-107: Imposing a Civil Penalty in Cause 04-4921-87 (UA 157 Political Action Committee)
 - i. Order 2004-108: Imposing a Civil Penalty in Cause 04-4935-88 (Quality Through Progress Political Action Committee)
 - ii. Order 2004-109: Imposing a Civil Penalty in Cause 04-4938-89 (Midwest Leadership PAC)
 - iii. Order 2004-110: Imposing a Civil Penalty in Cause 04-4966-90 (Friends of Fishers Political Action Committee)
 - liii. Order 2004-111: Imposing a Civil Penalty in Cause 04-5008-91 (D & K PAC)
 - liv. Order 2004-112: Dismissing Cause 04-5016-92 (Yanos for State House)
 - lv. Order 2004-113: Imposing a Civil Penalty in Cause 04-5024-93 (Porter County Young Democrats)
 - lvi. Order 2004-114: Imposing a Civil Penalty in Cause 04-5066-94 (Ross J. Cook for State Representative)
 - lvii. Order 2004-115: Imposing a Civil Penalty in Cause 04-5075-95 (Citizens for Everitt)
 - lviii. Order 2004-116: Imposing a Civil Penalty in Cause 04-5086-96 (White for State Senator)
 - lix. Order 2004-117: Dismissing Cause 04-5028-97 (Committee to Elect Connie Basham)
 - lx. Order 2004-118: Imposing a Civil Penalty in Cause 04-100 (Family Express Corporation)
 - lxi. Order 2004-119: Imposing a Civil Penalty in Cause 04-103 (Walgreens)
 - lxii. Order 2004-120: Imposing a Civil Penalty in Cause 04-109 (Overhead Door Co. of Indianapolis, Inc.)

Mr. Burdick recused himself from consideration of the following campaign finance matters. Mr. Roob then assumed the Chair and as acting Chair indicated that he would entertain a motion with respect to Orders 2004-64, 2004-65, 2004-121, 2004-122, 2004-123, 2004-124, and 2004-125. Mr. Long moved, seconded by Mr. John, that Orders 2004-64, 2004-65, 2004-121, 2004-122, 2004-123, 2004-124, and 2004-125 be approved as submitted. There being no further discussion, the Chair called the question, and declared that with four members voting "aye" (Mr. Chavis, Mr. John, Mr. Long, and Mr. Roob), and no Commission member voting "no," the motion was adopted and the following orders were approved:

- lxiii. Order 2004-64: Imposing a Civil Penalty in Cause 04-4367-20 (SAFECO Political Action Committee)
- lxiv. Order 2004-65: Imposing a Civil Penalty in Cause 04-4709-25 (Paul Helmke Committee)
- lxv. Order 2004-98: Dismissing Cause 04-4187-78 (Indiana Electric Association PAC)

- lxvi. Order 2004-104: Imposing a Civil Penalty in Cause 04-4458-84 (Indiana Association of Homes & Services for the Aging PAC
- lxvii. Order 2004-121: Imposing a Civil Penalty in Cause 04-101 (Contech Construction).
- lxviii. Order 2004-122: Imposing a Civil Penalty in Cause 04-102 (Paul I. Cripe, Inc.)
- lxix. Order 2004-123: Dismissing Cause 04-105 (The Linder Company)
- lxx. Order 2004-124: Imposing a Civil Penalty in Cause 04-107 (Ace Mortgage Funding, Inc.)
- lxxi. Order 2004-125: Imposing a Civil Penalty in Cause 04-108 (The Prairie Group)

Mr. Burdick then resumed the Chair.

B. Continued Causes:

The Chair recognized Mr. Simmons to administer the oath to each individual who would be presenting testimony to the Commission at its meeting.

After Mr. Simmons administered the oath, the Chair noted that Motions to Reconsider had been filed in the following causes:

1. Order 2004-75 Imposing a Civil Penalty in Cause 04-4953-42 (Proud Republicans Inviting Democratic Endorsement)

The Chair noted that Commission members had been provided with a copy of a Motion to Reconsider in this matter filed on August 31, 2004 by Mr. David Brooks, who serves as counsel to Proud Republicans Inviting Democratic Endorsement. A copy of the Motion is incorporated by reference in these minutes.

The Chair noted that Mr. Marion Redstone had also filed an appearance on behalf of the committee in this matter, and recognized Mr. Redstone who indicated that this committee had hired counsel to appear for them at the last Commission meeting, however, their counsel made a mistake with respect to the date of the meeting and failed to appear before the Commission at the meeting.

Mr. Redstone indicated that they had prepared some material to submit to the Commission at its last meeting that he would like to submit to the Commission at this time. He explained that the committee's report was timely filed with the Marion County Election Board but not with the Election Division and indicated that this error shows that a good faith attempt was made to comply with the law. He indicated that as soon as Marion County notified their committee that the report had been filed in the wrong office, they faxed the report to the Election Division.

Mr. Long asked whether anyone knew what action the Commission took at its last meeting. The Chair indicated that the proposed fine against this committee at the Commission's last meeting was Three Hundred Fifty Dollars (\$350) plus costs and that the Commission voted

at its last meeting to impose a penalty in the amount of one-half of the proposed penalty in the amount of One Hundred Seventy Five Dollars (\$175) plus costs.

The Chair closed the testimony on cause 04-4953-42.

Mr. John moved to deny the Motion for Reconsideration in that it was his recollection that this committee received the Commission's customary reduction of penalty under the circumstances and that the appearance of counsel at the Commission's last meeting would not have changed the result. The Chair seconded the motion and asked if there was any discussion on the motion.

Mr. Long observed that the Commission reduced a proposed fine against the Larry Chubb committee from Two Hundred Fifty Dollars (\$250) down to Twenty Five Dollars (\$25). Mr. John indicated that he though the *Chubb* case involved a different issue. Mr. Long indicated that he thought that this committee had timely deposited the report in priority mail for delivery and produced a receipt showing this was done.

There being no further discussion, the Chair called the question, and declared that with four members voting "aye" (Mr. Burdick, Mr. Chavis, Mr. John, and Mr. Long), and no Commission member voting "no," the motion was approved and the Motion for Reconsideration was denied.

2. Order 2004-92 Imposing a Civil Penalty in Cause 04-1235-72 (I.B.E.W. Local Union 369 Political Action Committee)

The Chair noted that Commission members had been provided with an additional letter filed on behalf of I.B.E.W. Local Union 369 Political Action Committee with respect to this matter.

The Chair recognized Mr. King who explained that this matter was heard by the Commission at its August 26, 2004 meeting as indicated on page forty three of the minutes from that meeting. He explained that, prior to the Commission's August 26, 2004 meeting, the Co-Directors were out of state at a conference and received a letter from I.B.E.W. Local Union 369 Political Action Committee during their absence. He explained that, although the letter was received before the Commission's August 26, 2004 meeting, the letter was not discovered and brought to the attention of the Commission at that meeting. He added that the Commission may want to consider the information in the letter prior to adopting an order with respect to this case. Mr. King then directed the Commission's attention to the letter in the Commission's materials.

The Chair indicated that he believed this was a situation where the committee timely sent the report by certified mail but it was not filed until after the deadline.

Mr. John moved, seconded by Mr. Long, to impose 25% of the proposed fine in the sum of One Hundred and Twelve Dollars and Fifty Cents (\$112.50) plus costs in the amount of Two Dollars and Fifty Cents (\$2.50 for a total of One Hundred and Fifteen Dollars (\$115). There being no further discussion, the Chair called the question, and declared that with four

members voting “aye” (Mr. Burdick, Mr. Chavis, Mr. John, and Mr. Long), and no Commission member voting “no,” the motion was adopted.

3. Order 2004-100: Imposing a Civil Penalty in Cause 04-4294-80 (Ulmer for State Representative)

The Chair noted that Commission members had been provided with an additional letter filed on behalf of Ulmer for State Representative. The Chair asked Mr. King if this case presented the same situation as the last case.

Mr. King stated that this was correct, and explained that there was a one page letter that was received by the Election Division prior to the Commission’s August 26, 2004 meeting that was not presented to the Commission that is being presented to the Commission at today’s meeting for the Commission’s consideration prior to adopting an order with respect to this case. Mr. King indicated that the action the Commission took in the case is reflected on page forty four of the minutes of the August 26, 2004 meeting and he then directed the Commission’s attention to the letter in the Commission’s materials.

Mr. John moved, seconded by Mr. Long, to impose 25% of the proposed fine in the sum of One Hundred and Twelve Dollars and Fifty Cents (\$112.50) plus costs in the amount of Two Dollars and Fifty Cents (\$2.50 for a total of One Hundred and Fifteen Dollars (\$115). There being no further discussion, the Chair called the question, and declared that with four members voting “aye” (Mr. Burdick, Mr. Chavis, Mr. John, and Mr. Long), and no Commission member voting “no,” the motion was adopted.

4. Cause 04-421-69 (Indiana’s 9th Congressional Democrat Central Committee)

The Chair indicated that the next item on the agenda involved a delinquent April 2004 pre-primary report. The Chair recognized Pam Potesta who stated that the Indiana 9th Congressional Democrat Central Committee had submitted a letter that is included in the Commission’s material.

After review of the letter Mr. John indicated that he moved to impose the full fine against the committee since the letter indicates that the committee did not receive campaign finance forms from the Election Division which the committee used as a reminder to file the forms in a timely manner. Mr. John indicated that he did not believe that committees should use the Election Division as their personal reminder service.

The Chair asked whether there was a second to Mr. John’s motion. There being none, Mr. John indicated that he would withdraw the motion for an alternate motion from another Commission member.

Mr. Long moved, seconded by Mr. Chavis, to reduce the fine to 50% of the proposed fine in the amount of One Hundred Dollars (\$100) plus costs in the amount of Five Dollars (\$5) for a total amount of One Hundred Five Dollars (\$105).

Mr. John asked whether this took into account the prior offenses. Mr. Long responded that, in the past, the Commission had imposed 25% of the proposed fine if a committee had not

prior offenses, 50% of the proposed fine if a committee had one prior offense, 75% of the proposed fine if the committee had two prior offenses and 100% of the proposed fine if the committee had 3 or more prior offenses.

There being no further discussion, the Chair called the question, and declared that with four members voting “aye” (Mr. Burdick, Mr. Chavis, Mr. John, and Mr. Long), and no Commission member voting “no,” the motion was adopted.

5. Cause 04-110 (Keramida Environmental, Inc.)

The Chair indicated that the next agenda items involved excess corporate and labor organization contributions, cause 04-110, the Keramida Environmental, Inc. The Chair asked if anyone was present from this organization.

The Chair recognized Dan L. Strahl who identified himself as the attorney for Keramida Environmental, Inc. Mr. Strahl explained that the written submissions show that Keramida made a contribution of Five Hundred Dollars (\$500) to the Democratic State Central Committee on January 21, 2003 and another Five Thousand Dollars (\$5,000) to the Democratic State Central Committee on April 11, 2003. He further explained that on April 17, 2003, less than 6 days after the excess contribution, Keramida discovered the mistake and obtained a Five Hundred Dollar (\$500) refund back from the Democratic State Central Committee.

Mr. Strahl asked the Commission to treat this case like the Commission has treated other similar cases and noted that this corporation has not ever been before the Commission for a previous violation. Mr. Stahl cited the *Meijer* case decided by the Commission in 1999 and other more recent cases that are similar to this case in that the entity engaged in the violation discovered the violation and remedied the violation by refund. He stated that the Commission had dismissed these other cases and that he was asking the Commission to dismiss the present case against Keramida. He added that the person who issued the check at Keramida has been given some additional training with respect to contribution limits.

There being no questions from Commission members, the Chair closed the hearing in this matter.

Mr. John moved to dismiss the case based upon the Commission’s interest in promoting self-policing on the part of corporations and labor organizations. Mr. John indicated that he thought it important to note that, based upon the testimony, Keramida caught the mistake and that he felt it was important that the corporation or labor organization find the mistakes and not the committee receiving the contribution.

Mr. Long seconded the motion and added that he agreed that it was important to promote self-policing. There being no further discussion, the Chair called the question, and declared that with four members voting “aye” (Mr. Burdick, Mr. Chavis, Mr. John, and Mr. Long), and no Commission member voting “no,” the motion was adopted.

Mr. Burdick recused himself from consideration of the two remaining excess corporate and labor organization contribution cases. Mr. Roob then assumed the Chair as proxy for Mr. Burdick.

6. Cause 04-104 (Anheuser-Busch, Inc.)

Acting Chair Roob stated that the next agenda items involved excess corporate and labor organization contributions. He then called cause 04-104, Anheuser-Busch, Inc. The Chair asked if anyone was present from this organization.

The Chair opened the public hearing and requested a report from the campaign finance directors. The Chair recognized Ms. Thompson who indicated that Anheuser-Busch contributed a total of Ten Thousand Seven Hundred Ninety One Dollars and Thirty Cents (\$10,791.30) to the Kernan for Indiana committee in 2003. She indicated that the Kernan for Indiana committee did refund Five Thousand Seven Hundred Ninety One Dollars and Thirty Cents (\$5,791.30) to Anheuser-Busch. She stated that the proposed penalty was three times the excess contribution.

The Chair recognized Peter Rusthoven who indicated that he was with the law firm of Barnes & Thornburg and that he represented Anheuser-Busch, Inc. in this case. Mr. Rusthoven also introduced his partner Bill Moreau and Jake Older, the Associate General Counsel for Anheuser-Busch. Mr. Rusthoven indicated that he had filed a brief with the Commission on Monday respectfully requesting that this case be dismissed. He stated that Mr. Moreau will address the facts and that he would address legal arguments.

Mr. Moreau indicated that he would walk the Commission through the documents submitted with their memorandum and marked with numbered tabs. He stated that he has examined Anheuser-Busch's system for tracking political contributions and that, in his view, it is very sophisticated. He added that the system proved itself vulnerable because of the intervention of the holidays.

He explained that there were two corporate entities under which Anheuser-Busch made contributions in Indiana. He stated that the materials refer to both Anheuser-Busch Companies, Inc., which he will refer to as "ABC," the Anheuser-Busch holding company, and Anheuser-Busch, Inc., which he will refer to as "ABI," that is actually the brewing company.

He stated that tab 2 is a copy of a computer record that illustrates how carefully Anheuser-Busch monitors its corporate political contributions on a state-by-state basis. He indicated that the record shows the contribution subcategories with contribution limits identified and then next to these entries are spaces to show the contributions budgeted and the contributions made. He says this shows that in 2002 ABC made a Five Thousand Dollar (\$5,000) contribution to the Kernan for Indiana committee. He said that the page behind this shows that the 2003 proposed political contributions in Indiana were for the amount of Four Thousand Dollars (\$4,000) for the Kernan for Indiana committee and One Thousand Dollars (\$1,000) for candidate Vi Simpson.

He stated that tab 3 shows a request form that a member of the Anheuser-Busch government relations team filled out before the check was issued in this case. He indicated that the request was dated December 6, 2002 with a request that the check be issued quickly for the annual Governor's holiday ball held in December of each year. He stated the check must go through a legal compliance check to make sure that the contribution requested by the government relations team complies with relevant state law. He stated that the December 6, 2002 request resulted in the check issued by ABC dated December 20, 2002 a copy of which is under tab 4.

He explained that, pursuant to Anheuser-Busch corporate tradition, employees are given the weeks of Christmas and New Year's off from work and, therefore, Friday, December 20, 2002 was the Friday before the two-week holiday break. He stated that the person that was in charge of the mail prior to the holiday left on her two-week leave before placing the check in the mail. He stated that, as a result, the check was not delivered in Indianapolis to the Kernan for Indiana committee until January 2003.

He explained that, by check dated August 25, 2003, the Indiana Democratic Party committee was sent a check in the amount of One Thousand Seven Hundred Ninety One Dollars and Thirty Cents (\$1,791.30) from Anheuser-Busch Inc., not ABC. He stated that later in 2003 ABC made a Four Thousand Dollar (\$4,000) contribution to Kernan for Indiana. He explained that, at the time of this contribution, ABC thought it could make this contribution because it thought its Five Thousand Dollar (\$5,000) contribution was made in 2002 and it had no way of knowing that the Five Thousand Dollar (\$5,000) contribution was posted by the Kernan for Indiana committee in 2003.

Mr. Moreau explained that ABC, in policing itself, determined that the Commission might consider the December 20, 2002 check was a 2003 contribution, and as a result, ABC went to the Vi Simpson for Governor Committee and received a refund of the One Thousand Dollars (\$1,000) it contributed to her committee in March, 2003.

He explained that tab 7 shows how the Kernan for Indiana committee records that it received the December 20, 2002 check from ABC on January 30, 2003. He stated that the Kernan for Indiana committee also posted the contribution from ABI of One Thousand Seven Hundred Ninety One Dollars and Thirty Cents (\$1,791.30) to the Indiana Democratic Party in December, 2003. He stated that this check was not payable for the Kernan for Indiana committee and should not have been deposited in that committee's account.

He stated that the Kernan for Indiana committee shows the initial Five Thousand Dollar (\$5,000) contribution it received in January of 2003 would preclude the committee from accepting any further contributions during 2003 from ABC and, therefore, Kernan for Indiana committee refunded ABC the amount Five Thousand Seven Hundred Ninety One Dollars and Thirty Cents (\$5,791.30). He stated that this refund check is shown in tab 8.

He stated that these records demonstrate that Anheuser-Busch takes seriously its obligation to comply with Indiana law regarding campaign contributions but that, under the circumstances, it is understandable that the Kernan for Indiana took the actions it took and that the Election Division investigated the situation.

Mr. Rusthoven stated that the One Thousand Seven Hundred Ninety One Dollar and Thirty Cent (\$1,791.30) contribution by ABI to the Indiana Democratic Party in 2003 was simply mistakenly reported as a contribution received by the Kernan for Indiana committee in 2003. He stated that the second reporting error involved here is reporting the Four Thousand Dollar (\$4,000) contribution from ABC as having been made by ABI. He stated that these two things together would indicate that ABI made contributions to the Kernan for Indiana committee in the amount of Five Thousand Seven Hundred Ninety One Dollars and Thirty Cents (\$5,791.30) in 2003. Mr. Rusthoven stated that, regardless, the Kernan for Indiana committee addressed the situation by refunding money in 2003 which was in advance of the Election Division's investigation.

Mr. Rusthoven argued that the December 22, 2002 check from ABC to the Kernan for Indiana in the amount of Five Thousand Dollars (\$5,000) was considered by ABC to have been a 2002 contribution that would permit ABC to make the additional contribution of Four Thousand Dollars (\$4,000) to the Kernan for Indiana committee that it made later in 2003. He stated that from every stand point, from every decision maker at Anheuser-Busch the December 22, 2002 check for Five Thousand Dollars (\$5,000) was considered a 2002 contribution since the amount was budgeted, the request was made, and the check cut, all in 2002. He stated that the only thing that did not occur was the ministerial task performed by administrative staff of depositing the check in the U.S. mail.

He acknowledged that IC 3-9-1-25.5 states that a contribution is made for purposes of this article during the calendar year in which the person relinquishes control over the contribution by: (1) depositing it in the U.S. mail; or (2) transferring the contribution to any other person who has been directed to convey the contribution to the recipient. He argued that Anheuser-Busch met the second part of this definition when it transferred the contribution to the person assigned the ministerial task of conveying it to the intended recipient.

He added that, even if the Commission would consider the Five Thousand Dollars (\$5,000) December 22, 2002 check to have been made in 2003, he would respectfully submit that there still has been no violation in the case since there were refunds sought and made during 2003 prior to the instigation of any investigation by the Election Division. He stated that this was an example of self-policing which should be taken into consideration and that it is consistent with Commission precedent to dismiss excess contribution cases where self-policing has been demonstrated. He respectfully requested dismissal of this case and asked if the Commission had any questions.

Mr. John asked whether the gravaman of counsel's argument was that ABC lost control of the contribution in 2002. Mr. Rusthoven confirmed that the substance of part of the argument that control of a contribution is relinquished when the contributor deposits it in the mail or relinquishes control to someone other than a U.S. postal worker who has the ministerial task of accomplishing the delivery to the intended recipient.

Mr. Chavis asked whether the transfer had to be made to someone outside the company making a contribution to be considered relinquishing control under the statute. Mr. Rusthoven indicated that he works within a large law firm that has partners, and above him is the managing partner of the Indianapolis office, and above them is the managing partner

of the whole world-wide firm empire. He stated that the firm also employees associates, secretaries and people who handle copies. He added that Anheuser Busch is even larger than Barnes & Thornburg. He stated that if he handed something to a messenger that, even though that messenger receives a Barnes & Thornburg paycheck, the messenger exercises no responsibilities over legal positions in the materials other than simply delivering the material and he would consider that relinquishing control of the material much like the control of the check was relinquished in this case after it went through the hands of all the decision-makers in the company and was delivered to an employee who had the simple ministerial duty of delivering the check.

Mr. John asked what would have happened had someone from legal affairs in the company went to the employee with the ministerial duty and requested that the check be returned. Mr. Older said that this could have occurred before where this was a question and that he would expect the check to be returned. Mr. Rusthoven indicated that there would have been no reason for that to occur in this case since there was no question that it was a proper 2002 contribution since everyone in a position to make such a decision believed the check was gone.

Mr. John asked if anyone knew how the contribution to the Indiana Democratic Party was deposited in the Kernan for Indiana committee. Mr. Long indicated that the Kernan for Indiana committee is in the same office as the Indiana Democratic committee and, at one point, the Marion County Democratic central committee. He indicated that the Indiana Democratic Party state committee had inadvertently deposited a check for a county commissioner candidate that the committee thought was for a county commissioner's coordinated campaign.

There being no further questions, the Chair closed the hearing.

Mr. John acknowledged the evidence of self-policing in the case and the corporate controls and indicated that based upon this evidence alone he moved to dismiss the case. Mr. Long seconded the motion and added that he thought that the Anheuser-Busch company believed in good faith that the December 22, 2002 check resulted in a 2002 contribution. There being no further discussion, the Chair called the question, and declared that with four members voting "aye" (Mr. Roob, Mr. Chavis, Mr. John, and Mr. Long), and no Commission member voting "no," the motion was adopted.

7. Cause 04-106 (Standard Management)

The Chair indicated that cause 04-106 was the next agenda item and he opened the hearing on the case and requested staff report. The Chair recognized Ms. Thompson who referred to records that indicate that Standard Management contributed to the Mitch Daniels for governor committee the sum of Seven Thousand Five Hundred Dollars (\$7,500) during 2003. She stated that Standard Management has never been before the Commission for a previous violation and that the Mitch Daniels for governor committee refunded Two Thousand Five Hundred Dollars (\$2,500) to Standard Management. She added that the proposed civil penalty is three times the excess corporate contribution.

The Chair recognized Marilyn Moores who introduced herself as an attorney with the law firm of Cohen & Malad and indicated that she was appearing on behalf of Standard Management Corporation. Ms. Moores also introduced Nancy Miller from Standard Management Corporation and indicated that Ms. Miller would address the Commission in a few minutes.

Ms. Moores indicated that Standard Management Corporation was not an empire, nor even a fiefdom, but is an Indiana corporation that is a holding company for several other entities. She indicated that this case is similar to the one the Commission just heard. She explained that in August 2003 Standard Management Corporation made a contribution of Two Thousand Five Hundred Dollars to the Mitch Daniels committee, which was an exploratory committee at the time. She stated that on December 24, 2003 Standard Management Corporation made a contribution of Five Thousand Dollars (\$5,000). She stated that the Mitch Daniels committee refunded the Five Thousand Dollar (\$5,000) contribution on December 31, 2003 and it was received by Standard Management Corporation on January 9, 2004.

She explained that Standard Management Corporation itself did not catch the excess contribution before the campaign committee refunded the contribution. She stated that she hoped that after the Commission heard the testimony of Ms. Miller that the Commission would place a value on an entity that has learned its lesson from errors and responded by implementing additional internal controls to prevent this from happening again. She explained that Standard Management Corporation has never had a previous violation before the Commission. She explained that the error in this case involved an error made by an individual who simply did not check the right box on a check request.

The Chair recognized Ms. Miller who identified herself as an employee of Standard Management Corporation. Ms. Miller expressed her sincere apologies for the error that brought them before the Commission at today's meeting. Ms. Miller explained that Standard Management Corporation does try to be a good corporate citizen that respects the campaign finance laws in Indiana. She offered her assurance that Standard Management Corporation has taken steps to prevent a similar blunder in the future.

She explained the Standard Management Corporation is a holding company that has a number of corporate entities that are members. She stated that, in response to the notification of the pending violation, the company has implemented a "checks and balances" system whereby the contribution request must be approved by the corporate general counsel and the contributions of all the entities within Standard Management Corporation are a part of a single tracking tool. She confirmed that the pending violation was the result of an individual who checked the wrong box on a contribution request form. She stated that a legal contribution in the same amount could have been made had it been structured differently within the corporate family. She indicted that Standard Management Corporation takes the violation very seriously and that they were prepared to accept responsibility for the pending violation and any action that the Commission may take on the pending violation.

She did request that the Commission consider dismissing the case, or at least reduce the proposed fine, based upon the fact that the pending action constituted Standard Management Corporation's first violation and Standard Management Corporation

implemented corrective action in response to the violation. She thanked Commission for the opportunity to address them about the case.

Mr. Long asked for additional explanation regarding how the violation occurred, the new procedures, and when the new procedures were implemented by Standard Management Corporation. Ms. Miller referred the Commission members to the contribution request form used by Standard Management Corporation. She indicated that, at the top of the form, are the list of corporate entities that comprise Standard Management Corporation and a place to indicate which of the entities the contribution check should come from. She explained on the pending violation, the employee should not have checked Standard Management Corporation as the contributing agency since that company had made a previous contribution that, when added to the contribution that resulted in the pending violation, exceeded the statutory contribution limit.

She explained that Standard Management Corporation made changes to the contribution request process immediately after they found the error in January after the contribution was refunded to Standard Management Corporation. She stated that the company changed their political contribution process to require the corporate counsel to review a database that tracks all the contributions made by any of the corporations that are affiliated with Standard Management Corporation.

The Chair recognized Ms. Moores who indicated that she would add that each check request that seeks a political contribution identifies the entity that seek to make the contribution and the general counsel enters that into a database that tracks political contributions of all the contributions made by any of the corporations that are affiliated with Standard Management Corporation. She explained that the database is updated after each contribution request is made so that the general counsel has the most current information for all the entities available at the time he reviews contribution requests to make sure the request complies with Indiana law.

The Chair closed the hearing and asked whether Commission members desired to discuss the case.

The Chair recognized Mr. Long who stated that he was impressed that Standard Management Corporation recognized the need to change their contribution request process before the pending violation was discovered by the Election Division and that this was an example of self-policing. He explained that he thought the company had a reasonably good system in place before the pending violation but that their further actions recognized the need to centralize the decision-making and track all affiliated entities in a central database further improved their system.

Mr. Long moved, seconded by Mr. John, to dismiss the case. There being no further discussion, the Chair called the question, and declared that with four members voting “aye” (Mr. Roob, Mr. Chavis, Mr. John, and Mr. Long), and no Commission member voting “no,” the motion was adopted.

Brian Burdick returned to the meeting and resumed the Chair.

C. New Causes:

1. Cause 04-5197-111 (Kapetanov for Governor)

The Chair indicated that the Commission would proceed with the next agenda item, delinquent post- May 2004 primary statement of organizations. The Chair called Cause 04-5197-111, Kapetanov for Governor and opened a hearing on the case.

The Chair asked if anyone at the Commission's meeting was present on behalf of this committee. There being no response, the Chair closed the hearing on the case.

Mr. John moved, seconded by Mr. Long, that the entire proposed fine be imposed in the amount of One Thousand Dollars (\$1,000) plus costs in the amount of Two Dollars and Fifty Cents (\$2.50) for a total of One Thousand Two Dollars and Fifty Cents (\$1,002.50) for the reason that the committee has not corrected the outstanding violation by filing a report and has not appeared before the Commission to offer an explanation. There being no further discussion, the Chair called the question, and declared that with four members voting "aye" (Mr. Roob, Mr. Chavis, Mr. John, and Mr. Long), and no Commission member voting "no," the motion was adopted.

2. Cause 04-5199-112 (Steve Wolfe for Representative)

The Chair opened the hearing for cause 04-5199-112, Steve Wolfe for Representative and asked if anyone was present to appear on behalf of the committee.

The Chair recognized Steve Wolfe who identified himself and indicated that he lived in Cicero, Indiana and worked in Marion, Indiana. Mr. Wolfe explained that he thought he mailed a statement of organization as required. He indicated that on August 31, 2004 he talked with Bonnie in Grant County voter registration, who stated that Pam Potesta had called Bonnie earlier in the day and explained to her that the statement could be faxed to the Election Division. He indicated that he faxed the statement of organization to the Election Division on August 31.

Mr. John asked why the statement of organization wasn't mailed earlier. Mr. Wolfe explained that he had prepared the statement of organization prior to being nominated to fill a vacancy but that when he asked about filing it he was told that he had not yet been nominated so that there was no need to. He stated that, after his nomination, he simply forgot to send the form in so that it would arrive on time.

Mr. John asked how much money the committee raised between the time the statement should have been filed on July 13 and the time it was filed. Mr. Wolfe responded that he had received no contributions and made no expenditures with respect to his candidacy.

Mr. John asked whether Mr. Wolfe had ever run for office before. Mr. Wolfe indicated that he ran for office in 1984.

There being no further questions, the Chair closed the hearing.

Mr. John moved that the Commission impose 25% of the proposed fine in the amount of Two Hundred Fifty Dollars (\$250) plus costs in the amount of Two Dollars and Fifty Cents (\$2.50) for a total of Two Hundred Fifty Two Dollars and Fifty Cents (\$252.50) for the reason that the fine should be reduced to 50% of the proposed fine because the candidate appeared at the Commission's meeting and reduced another 25% because the committee has had no previous campaign finance violations. Mr. Long seconded the motion. There being no further discussion, the Chair called the question, and declared that with four members voting "aye" (Mr. Burdick, Mr. Chavis, Mr. John, and Mr. Long), and no Commission member voting "no," the motion was adopted.

Mr. Wolfe asked whether his other case today could be taken out of order so that he could return to his home to provide care to his wife. The Chair indicated that he would take Mr. Wolfe's delinquent post-May primary nomination campaign finance report next.

3. Cause 04-5199-115 (Steve Wolfe for Representative)

The Chair called 04-5199-115, Steve Wolfe for Representative, and opened a public hearing on the case.

The Chair recognized Mr. Wolfe who stated that he had received a list of deadlines from the prior person who was going to run for the office and it only listed the pre-election report filed on the CFA-4 in October. He stated that he did not realize that there would be such a report due prior to October. He also explained that he raised no money before or after his nomination to include on a CFA-4 report. Mr. Wolfe indicated that he didn't know what information Commission members had available to them but he wanted to make sure that the Commission members knew that he filed the report yesterday.

The Chair asked whether Commission members had any questions for Mr. Wolfe. There being none, the Chair closed the public hearing on the case.

Mr. John moved to impose 50% of the proposed fine in the amount of Five Hundred Dollars (\$500) plus costs, however, he was receptive to an amendment to the motion to further reduce the fine and, in effect, treat both campaign finance violations by this committee as one. The Chair indicated he would like to amend the motion and asked whether the motion shouldn't be withdrawn so that a new one could be made. Mr. John withdrew his motion.

The Chair moved, seconded by Mr. Chavis, to impose Two Hundred Fifty Dollars (\$250) plus costs in the amount of Two Dollars and Fifty Cents (\$2.50) for a total of Two Hundred Fifty Two Dollars and Fifty Cents (\$252.50). There being no further discussion, the Chair called the question, and declared that with four members voting "aye" (Mr. Burdick, Mr. Chavis, Mr. John, and Mr. Long), and no Commission member voting "no," the motion was adopted.

4. Cause 04-5200-113 (McGlothen for Indiana)

The Chair called case 04-5200-113, McGlothen for Indiana, opened a public hearing and asked if a representative of the committee was present.

Ms. Potesta explained that Mr. McGlothen submitted a written request, a copy of which was in the Commission's materials, to continue this case along with the other case pending on today's agenda under cause 04-5200-116.

Mr. Long moved, seconded by the Chair, to continue the two cases. There being no further discussion, the Chair called the question, and declared that with four members voting "aye" (Mr. Burdick, Mr. Chavis, Mr. John, and Mr. Long), and no Commission member voting "no," the motion was adopted and the two cases were continued.

5. Cause 04-5197-114 (Kapetanov for Governor)

The Chair called case 04-5197-114, Kapetanov for Governor, opened a public hearing and asked if a representative of the committee was present.

There being no response, the Chair closed the public hearing and asked if there was a motion on the case.

Mr. John moved, seconded by Mr. Long, that the entire proposed fine be imposed in the amount of One Thousand Dollars (\$1,000) plus costs in the amount of Two Dollars and Fifty Cents (\$2.50) for a total of One Thousand Two Dollars and Fifty Cents (\$1,002.50). There being no further discussion, the Chair called the question, and declared that with four members voting "aye" (Mr. Burdick, Mr. Chavis, Mr. John, and Mr. Long), and no Commission member voting "no," the motion was adopted.

6. Voting System Certifications

The Chair indicated that the next agenda item involved voting system certifications and asked if Mr. King would be making a report.

The Chair recognized Mr. King, who stated that he and Co-Director Robertson would be making the report on the status of voting system certifications. Mr. King directed the Commission members to the voting system tab in their materials and specifically to the memorandum from the Co-Directors to the Commission members regarding the status of the pending voting system certifications.

- a. **MicroVote direct record electronic Infinity voting panel firmware upgrade (Version 2.13)**
- b. **Voting Technologies International direct record electronic VOTWare software upgrade (Version 3.6.10)**
- c. **Sierra Election Systems optical scan ballot marking device**
- d. **UniLect Corporation "The Patriot" direct recording electronic voting system**

e. Avante International Technology Vote-Trakker direct record electronic version 4.76.

Mr. King indicated that he would provide the Commission with an update and then yield to Ms. Robertson regarding the recommendation of the Co-Directors. He explained that with respect to the applications for approval of the first four voting systems listed on the agenda under voting systems, the MicroVote, Voting Technologies, Sierra Election Systems and UniLect Corporation voting systems, there has been no further activity on the applications since the Commission's last meeting. He stated that this was also true with respect to the voting system approval application for the Avante International Technology Vote-Trakker direct record electronic version 4.76.

- f. Election Systems & Software direct record electronic iVotronic firmware 9.0.0.0 (Unity 2.5 component)**
- g. Election Systems & Software Model 100 precinct tabulator optical scan firmware version 5.1.0.0 (Unity 2.5 component)**
- h. Election Systems & Software Model 650 centralized mark sense tabulator, version 2.0.0.0 (Unity 2.5 component)**
- i. Election Systems & Software Data Acquisition Manager (DAM) version 6.0.0.0; Election Reporting Manager (ERM) version 7.0.0.0; and Hardware Programming Manager (HPM) version 5.1.0.0 (Unity 2.5 software components).**

Mr. King stated that the four remaining voting system approval applications on the agenda are those filed by Election Systems & Software. He then directed the attention of Commission members to a letter in the Commission's materials that follows the Co-Director's memorandum on voting system. He stated that this letter is addressed to the Co-Directors and dated September 17, 2004, and is a cover letter that addresses the four pending applications submitted by Election Systems & Software.

He stated that the Election Systems & Software voting systems applications include applications for an iVotronic direct electronic record upgrade to Version 9.0, a Model 100 upgrade, a Model 650 upgrade and also a set of tabulation software functions that are part of the Unity 2.5 voting system. He stated that following the letter from Election Systems & Software is a letter from Wyle Laboratory dated September 17, 2004, setting forth findings with respect to the iVotronic 9.0 firmware and a letter from Ciber, another Independent Testing Authority, setting forth its finding with respect to the Unity 2.5 tabulation software. He indicated that the Commission materials also contained a copy of escrow material showing deposit of software with an escrow agent. He stated that, shortly before today's meeting, the Election Division received a typographical correction to the list of escrowed software indicating the escrow of "HPM" software instead of "WHPM." He stated that Election Systems & Software has also submitted a copy of its entire escrow agreement with DSI, the escrow agent. Mr. King then deferred to Ms. Robertson with respect to the recommendation of the Co-Directors with respect to the four voting system approval applications submitted by Election Systems & Software.

The Chair recognized Ms. Robertson who directed Commission members to page two of the Co-Directors' memo regarding their recommendation. She stated that based upon the

information provided to the Co-Directors by Election Systems & Software, including the reports from the Independent Testing Authorities, the Co-Directors are recommending that the iVotronic firmware version 9.0.0.0 be approved for use in Indiana elections for a term expiring on October 1, 2005. She explained that the time period is a little different for this voting system in that voting system approvals usually expire 5 years from the date of approval. She stated that there is a new statute that requires that pending voting systems approvals expire in October 1, 2005 in an attempt to synchronize the expiration of voting system approvals and in order to move approvals of voting systems to a non-election year. She stated that the recommendation of the Co-Directors for the approval of this voting system is subject to Election Systems & Software filing a complete report from the Independent Testing Authorities within 30 days after Election Systems & Software receives the reports from the Independent Testing Authorities. Ms. Robertson indicated that the Commission may want to consider each Election Systems & Software voting system approval application separately or all at once.

The Chair indicated that Ms. Robertson could continue as to the rest of the voting system approval applications that Election Systems & Software has pending and then the Commission could ask questions of representatives from Election Systems & Software and then take final action.

Mr. Robertson directed Commission members to page three of the Co-Directors' memo that addressed their recommendation with respect to the upgrade to the Model 100 Optical Scan voting system. She explained that at this point Election Systems & Software has not submitted Independent Testing Authority letters indicating that this firmware upgrade is fully compliant with the 2002 FEC voting system standards and the Co-Directors recommend that the Commission table the voting system approval application for the firmware upgrade to the Model 100 Optical Scan voting system.

Ms. Robertson directed Commission members to page Five of the Co-Directors' memo that addressed their recommendation with respect to the upgrade to the Model 650, which is a central count optical scan card reader. She stated that, similar to the situation with the Model 100, Election Systems & Software has not yet submitted Independent Testing Authority letters indicating that this firmware upgrade is fully compliant with the 2002 FEC voting system standards and the Co-Directors recommend that the Commission table the voting system approval application for the firmware upgrade to the Model 650 central count optical scan card reader.

Mr. Robertson then stated that, as indicated on page 6 of the Co-Directors' memorandum, Election Systems & Software has submitted a letter from an Independent Testing Authority indicating that the HPM, Data Acquisition Manager, and the Election Reporting Manager, all as components of the Unity 2.5 software, is fully compliant with the 2002 FEC voting system standards. She stated that the Co-Directors recommend that the Commission approve this software for a term that will expire October 1, 2005 subject to Election Systems & Software filing a complete report from the Independent Testing Authority within 30 days after Election Systems & Software receives the reports from the Independent Testing Authorities.

Mr. Long asked about the report that was still due. Ms. Robertson indicated that the Independent Testing Authorities have issued letters indicating that the system complies with 2002 FEC voting system standards but that there was a complete report to be provided sometime later. She explained that the official, complete report was not yet available.

Mr. Long asked whether the Commission had received the full report for the iVotronic Version 9.0.0.0 upgrade. Ms. Robertson indicated that the full report is not yet available but that the Commission has received a letter from Wyle Laboratories stating that the iVotronic Version 9.0.0.0 meets the 2002 FEC voting system standards but the full report is not yet available.

Mr. Long asked when the full report would be available and filed. Ms. Robertson indicated that the full report will be available as soon as Wyle Laboratories completes the report and that is why the Co-Directors have made their recommendation subject to Election Systems & Software the filing of the full Independent Testing Authority report. Mr. Long asked what would happen if the full report was never available and suggested that the Commission should set a date certain for the filing of the full report.

The Chair stated that perhaps the Commission members should hear from the representatives of Election Systems & Software who were present at today's meeting and he invited those representatives to come forward to address the Commission.

The Chair recognized John Groh who introduced himself as a representative of Election Systems & Software. Robb McGinnis also introduced himself as a representative of Election Systems & Software. Toby McClamroch introduced himself as the attorney for Election Systems & Software.

The Chair asked Mr. Groh to present, update, and address some of the issues raised by Commission members. Mr. Groh stated that the certification process is a more rigorous process with the 2002 FEC voting system standards than it was with the 1990 FEC voting system standards. He stated that his company is proud of the fact that their company is the first company that has completed the process. He indicated that, at this point, according to every indication Election Systems & Software has received from the Independent Testing Authorities (Ciber, the Independent Testing Authority that examines the software, and Wyle Laboratories, the Independent Testing Authority that examines the hardware, including the firmware), Election Systems & Software has met the applicable standards. He added that, because of current conditions in the market place, Wyle Laboratories has a manpower constraint since there are a number of other companies going through the same type of evaluation at the same time. He explained that Wyle Laboratories has only one person to bring all the data together for the full report and it is a challenge for them at this point to keep up.

He explained that Election Systems & Software has asked Wyle Laboratories to place a priority in finishing the full report on the iVotronic upgrade since this would provide the most benefit to the company and to Indiana with respect to the November election. He explained that the Model 100 and Model 650 letters and reports will come later. He stated that he would speculate that Wyle Laboratories would have the full report done on the iVotronic in the next two to three weeks. He stated that the Wyle Laboratory letter for the

Model 100 will probably be done within the next week. He stated that the Model 650 letter will probably come after the Model 100 letter.

He stated that all the information necessary to produce a full report on these voting systems has been collected. He stated that if the Commission had the Co-Directors call Wyle Laboratories they would confirm that they have the data they need to produce a report. He stated that the Independent Laboratories will not write a letter indicating compliance with the 2002 FEC voting system standards until they have all the documentation they need for a full report.

Mr. Long indicated that he was less concerned since the approval will expire on October 1, 2005 in any event. Mr. Long asked whether the Model 100 was the voting system that Johnson County officials were using.

Mr. Groh responded that Johnson County would be using a version of the Model 100 that has already been certified since they chose not to wait on the certification of the iVotronic upgrade.

Mr. Long indicated that it was his understanding that the Model 650 needs to be approved since that is the voting system used to count ballots in Marion County. Mr. Groh indicated that, with respect to the November election, Marion County decided to use the Model 100 and tabulate ballots at the precinct. He explained that the fact that the Model 650 will not be available in November will not place in jeopardy any of the elections in the four counties using the iVotronic or Marion County.

The Chair asked whether these counties were primarily concerned with approval of the iVotronic 9.0.0.0 upgrade and the Unity 2.5 software. Mr. Groh indicated that this was correct.

Mr. John asked about the parallel contingency plans for the counties that purchased the iVotronic for using other voting systems in November. Mr. Groh stated that Election Systems & Software proceeded with developing those contingency plans so that if the Commission did not approve the iVotronic 9.0.0.0 at today's meeting then those plans could be implemented in those counties. He added that they could do so because they are already using paper ballots as part of the absentee voting process which provides a natural lead-in to using the paper ballots in November. He stated that the ballot printing is in production right now and will be delivered by Friday September 24th to allow the counties to use those ballots in absentee voting.

Mr. John explained that he was concerned about giving approval of the voting systems without the full report with underlying documentation that supports the letters. He indicated that he had no reason to doubt anything Mr. Groh has said so far but he is also concerned that some things might be out of the control of Election Systems & Software. He indicated that he would like to see contingency plans in place in the event that the full reports indicate that there was some problem with the system. He asked how long Election Systems & Software could afford to wait for the full report before committing to the contingency plan of using the Model 100 voting system.

Mr. Groh indicated that the date was between October 1 and October 10 based on a county's need to start preparing its election workers to conduct the election.

Mr. Long indicated that he felt that neither the letter from Ciber or the Wyle Laboratories indicate much wiggle room with the respect to whether a full report will be issued since both letters state that a full report will, in fact, be issued. He stated that historically he believes the Commission has approved based upon letters like these that refer to a subsequent full report.

The Chair agreed the Ciber letter is unequivocal but he noted that the Wyle letter has one dangling participle in the second paragraph where it describes what tests were performed and in the third paragraph it indicates that the software code was reviewed and found to be in compliance with the 2002 FEC voting system standards. He explained that, in the next sentence, the letter states that functional testing was performed but it doesn't mention the 2002 FEC voting system standards with respect to the functional testing.

The Chair recognized Mr. Groh who explained that the hardware testing is the overlying general description of the testing performed by Wyle Laboratories. He indicated that within this general description Wyle Laboratories perform small boutiques of testing that allows them to state that they have completed the hardware testing. He stated that, within hardware testing, functional testing is performed where they actually run the voting system and they try to break it. He stated that they also perform other tests which are mechanical tests or stress tests where they subject the system to dropping and extremes in humidity and temperature. He stated that if the Commission believes there is any ambiguity in the letter, he would encourage the Commission to call Wyle Laboratories and ask them to clarify it.

The Chair stated that the next paragraph in the letter indicates that Wyle Laboratories will issue a report documenting the procedures performed and the results obtained documenting the compliance with 2002 voting system standards.

Mr. Long asked Mr. King if this was consistent with other letters issued by Independent Testing Authorities. Mr. King responded that the Wyle Laboratory reports have been evolving which was demonstrated by the letter issued with respect to MicroVote when their system came before the Commission. He stated that when Wyle Laboratories applied the 1990 FEC voting system standards then the Commission would receive a very short letter that reads a lot like the Ciber letter reads today. He stated Wyle Laboratories has been producing letters within the last twelve months or so that attempt to be much more detailed and precise with respect to the testing performed and compliance with the 2002 FEC voting system standards. He indicated that this has made it more difficult for lay persons to grasp whether the report is as full and complete as we would like it to be.

Mr. John indicated that he was going to assume that the full reports are not prepared and filed with the Commission. He asked Mr. Simmons, based upon that assumption, whether the Commission is within its power to approve the voting system.

Mr. Simmons stated that when the report came in there were a couple things discussed about the letter among staff. He indicated that staff has asked the Independent Testing Authorities to issue a letter that indicates two things: (1) that all tests required to be performed have been performed and; (2) that based upon those tests the voting system meets the 2002 FEC

voting system standards. He stated that, as Mr. King reported, the letters from the Independent Testing Authorities have been evolving. He stated that he had noticed the same ambiguity as others on the Commission but he read it in the context of whether the letter met the two tests he believes the letter should contain. For example, he believes that the phrase in the letter that indicates that they performed the tests “to verify compliance” is intended to convey that they performed the tests “that verify compliance.” He stated that staff has talked with Independent Testing Authorities in the past and asked them to clarify their letters and he is sure that they could do so in this particular case if the Commission wanted additional clarification. He stated that this would be up to the Commission.

He further explained that, with respect to whether the Commission may approve a voting system based upon a letter, Commissioner Long is correct when he pointed out that the Commission has approved voting systems many times previously based upon the letter indicating compliance with the FEC voting system standards without the benefit of having the full report filed at the time of approval.

Mr. John indicated that his question is whether, under the statute, if the full reports never come, are the letters sufficient under the statute to support approval of the voting system. Mr. Simmons responded that his answer is “yes” but that the Commission members have to exercise their judgment whether Commission members interpret the letter as he has indicating that the testing is complete and the voting system meets the 2002 FEC voting system standards.

The Chair recognized Ms. Robertson, who indicated that she agreed with both Mr. King’s and Mr. Simmons’ comments and analysis.

The Chair indicated that he wondered if they could get a clarification of the letter quickly.

Mr. Long indicated that perhaps he could make a motion to frame the issue. Mr. Long moved that the Commission adopt the recommendation of the Co-Directors subject to the receipt of an unambiguous report from Wyle Laboratories by October 1, 2004 which definitively states that their testing reveals that the voting system complies with the 2002 FEC voting system standards.

Mr. Long indicated that he felt like Wyle Laboratories ought to be able to clarify the letter within a week. He stated that he didn’t see why it couldn’t be accomplished with a phone call or a fax.

Mr. John indicated that the addition suggested by Mr. Simmons should clarify the letter to indicate that they performed functions tests “that” verified compliance rather than they performed tests “to” verify compliance.

The Chair seconded the motion and asked if there was discussion on the motion.

The Chair recognized Mr. McClamroch who stated that he was not sure what they can expect from the vendor and he indicated that it would be easier to obtain the clarification suggested by Mr. Simmons than to get Wyle Laboratories to issue a whole new letter. He stated that it has taken weeks to get the letter submitted to the Commission.

Mr. John asked Mr. McClamroch how to verify the interpretation without obtaining a new letter. Mr. McClamroch stated that Election Division staff could obtain the clarification orally over the phone. He indicated that the thought that the motion, as currently phrased, required more than what is necessary to clarify the letter. He stated that there is no question that the letter indicates the iVotronic 9.0.0.0 complies with the 2002 FEC voting system standards for everything except the functional testing.

Mr. Long indicated the ambiguity as to whether the additional documentation will document compliance with the 2002 FEC voting system standards or non-compliance. He indicated that he wanted confirmation that the full report that Wyle Laboratories will send will document full compliance with the 2002 FEC voting system standards.

Mr. McClamroch indicated that he thought the ambiguity was with the reference described by Mr. Simmons. Mr. Long stated that he would like to see something on a printed page signed by someone from Wyle that states that the system complies with 2002 FEC voting system standards. Mr. Long indicated he would like to see the same kind of letter from Wyle Laboratories that was submitted by Ciber.

Mr. McClamroch indicated that the Wyle Laboratories letter does indicate that the software code was reviewed and was found to be in compliance with the 2002 FEC voting system standards. Mr. Long agreed but indicated that all he was asking for is that the compliance be documented. He stated that he was not concerned about what form it takes as long as the additional clarification is in writing.

The Chair suggested that a phone call be made to the individual who signed the letter, Dawn Bates. He suggested that Ms. Bates could even respond by email to provide the clarification requested.

Mr. McClamroch asked if the Commission could recess so that this call could be made now. The Chair indicated that he thought it would be a good idea. He suggested that Mr. McClamroch and Mr. Groh could accompany Mr. King, Ms. Robertson and Mr. Simmons upstairs to make that phone call. The Chair asked if Commission members agreed and the members indicated that they did.

The Chair declared a recess and indicated that the Commission would reconvene at 3:30 p.m.

The Commission then recessed at 3:15 p.m.

The Commission reconvened at 3:30 p.m.

The Chair called the Commission to order and explained that Election Systems & Software was contacting someone to provide verbal clarification to both Co-Directors, followed by an email, to indicate the voting system's compliance with the 2002 FEC Voting Systems Standards. The Chair indicated that the Commission will table Mr. Long's motion with respect to the iVotronic 9.0.0.0.

The Chair indicated that the Commission could consider a motion at this time with respect to Election Systems & Software's Unity 2.5 election management software. Mr. Long asked whether Election Systems & Software was asking the Commission to table the request as to the Unity 2.5. Ms. Robertson indicated that the Co-Directors had recommended approval of the Unity 2.5 and referred the Commission to page 6 of the Co-Directors' memorandum.

The Chair moved to approve Elections Systems & Software's Data Acquisition Manager Version 6.0.0.0, Election Reporting Manager Version 7.0.0.0 and Hardware Programming Manager Version 5.1.0.0, collectively identified as the Unity 2.5 software components. Mr. Long asked whether the motion should be amended to indicate that the approval expires October 1, 2005. The Chair amended his motion to reflect that the approval would expire October 1, 2005. Mr. Long seconded the motion. There being no further discussion, the Chair called the question, and declared that with four members voting "aye" (Mr. Burdick, Mr. Chavis, Mr. John, and Mr. Long), and no Commission member voting "no," the motion was adopted.

The Chair the moved, pursuant to the recommendation of the Co-Directors, to table items identified on today's agenda under C (ii) for voting systems, specifically, items A, B, C, D, F, G and I until the next meeting. Mr. Long seconded the motion. There being no further discussion, the Chair called the question, and declared that with four members voting "aye" (Mr. Burdick, Mr. Chavis, Mr. John, and Mr. Long), and no Commission member voting "no," the motion was adopted.

The Chair indicated that he would proceed on the agenda until confirmation is received on iVotronic 9.0.0.0.

7. Litigation Report

The Chair recognized Mr. Simmons for a litigation report. Mr. Simmons indicated that the only cases listed on the agenda were the *Majors* and *Williams* cases. He stated that these cases have been pending for some time now. He explained that both of these cases were brought on behalf of Libertarian Party candidates that challenge the fines imposed by the Commission against their committees. He stated that the Libertarian Party candidates argue that, because the candidates neither raise nor spend money in their campaigns, they are not required by Indiana law to file campaign finance reports. He indicated there has been no further action taken on these cases since the Commission met last. He stated that there is a motion to dismiss still pending in one case and, in the other case, a motion to dismiss the administrative appeal portion of the case was dismissed but the case remains pending on other claims asserted in the case, including a 42 U.S.C. § 1983 claim and some state claims.

Mr. Long commented that, if the Commission only had those two cases pending against it, then it must be doing something right.

8. Report of Co-Directors

The Chair recognized Mr. King who stated that one item the Commission asked the Co-Directors to report on was the training provided to circuit court clerks, county election boards and others regarding provisional ballots. He reported that the Co-Directors have

been involved in reviewing scripts and ensuring the law is properly stated in videos that are being produced and will be available for poll worker training throughout Indiana. He stated that the videos will address a number of topics under HAVA and, specifically, the videos will address the provisional ballot process at the poll worker level. He stated that other videos that have been produced are directed more at voters as a part of a public education campaign but that these videos also address the provisional ballot process.

He stated that both Co-Directors have spoken to the members of the Association of Circuit Court Clerks at their meetings earlier this month at Fort Wayne and Bedford. He stated that the provisional ballot process was discussed at length and that many questions from the clerks were addressed at those meetings. He then deferred to Ms. Robertson about other activities regarding provisional ballot education and training.

Ms. Robertson stated that the Election Division developed a power point presentation that has been used in different presentations to the counties and which is posted on the Election Division's website. She added that the Election Division is attempting to distill this information into a three-page brochure that contains a frequently asked questions section. She said the Election Division continues to make itself available for training opportunities. She indicated that she will be driving to Lake County tomorrow to assist Susan Tielking, the HAVA education and training coordinator, perform some training for their poll workers. She said that there are other groups, including the League of Women voters, who will receive information and training regarding provisional voting so that they can further disseminate the information through their activities.

Mr. Burdick asked whether the power point presentation dealt specifically with provisional voting. Ms. Robertson indicated that it deals with provisional voting both from an election administrator's standpoint and a voter's standpoint and the presentation gives specific examples regarding persons who would receive a provisional ballot.

Mr. Burdick asked whether the Co-Directors could provide an email to the clerks to remind them that the power presentation is available and to communicate the problems that occurred with the use of provisional ballots in the primary, including votes that were thrown out because of poll worker mistakes. Mr. Long agreed.

The Chair recognized Mr. King who stated that the Commission, at its last meeting, approved an order that authorizes the use of an additional form that may address some of the problems experienced at the May primary. He stated that he and Ms. Robertson sent the form out to all the clerks with an explanatory memo that indicates that the clerks could print a larger provisional ballot envelope with the affidavits pre-printed on the envelope and that this would address some of the problems experienced with the affidavits during the primary.

The Chair asked if Commission members had any other questions. Mr. Long observed that no further action has been taken to pursue the applications for approval since the Commission's last meeting with respect to five voting systems on the agenda. Mr. Long asked whether the Co-Directors knew if the vendors were pursuing these applications and indicated that he was concerned that the vendors may try to amend these applications to circumvent filing fees or other statutory provisions. He stated it was his inclination to set a time limit on how long an application can remain pending before it is dismissed.

The Chair recognized Mr. King who stated that, with respect to MicroVote's pending application, the only thing outstanding was evidence that indicated escrow and a report indicating that the 2.13 complied with the 2002 FEC voting system standards. He stated that MicroVote had asked the Commission to approve the application before the May primary election and the Commission was unable to do so because of the missing elements. He stated that, before the Commission's August meeting, he emailed Steve Shamo at MicroVote and received information indicating that they were still interested in pursuing the application but had achieved no further progress on the outstanding items.

M. King stated that, with respect to Voting Technologies International direct record electronic system, the system has been previously approved and the current application is for approval of an upgrade. He explained that he spoke with Gary Parrish of Voting Technologies International to confirm they wanted to move forward and they indicated that they were interested but that they wouldn't move forward until the 2004 elections were completed.

Mr. King stated that, with respect to Sierra Election Systems application for approval of a device that would permit a blind or visually impaired individual to vote an optical scan ballot independently, he spoke with Rick Vogel who stated that the device is at the Independent Testing Authority. He stated that believed that neither he, nor Ms. Robertson, has seen this voting system demonstrated at a conference. Ms. Robertson agreed that she had not seen the system.

Mr. King stated that, with respect to UniLect's direct record electronic voting system, he had contacted representatives of UniLect prior to the Commission's August meeting to request follow-up on a letter that the Co-Directors sent early this year. He indicated that the UniLect representative that he spoke with indicated that they were unaware about the letter and that they were interested in pursuing the application and they would get back to Mr. King. Mr. King stated that he has heard nothing further from UniLect.

He stated that the final item on the agenda under voting systems is the Avante International Technology application. He stated that this application is for approval of a direct record electronic voting system and that it was his understanding that the company was still awaiting confirmation from the Independent Testing Authority that the system complies with 2002 FEC voting system standards.

The Chair asked how long voting system approval applications typically remain pending before the Commission. He indicated that he agreed with Mr. Long that there should be a time limit placed on an application for approval that is not being pursued.

Mr. Long indicated that he would make a motion that all pending voting system approval applications be placed on the agenda at the Commission's meeting in 2005 and notify them that they will be subject to a vote to approve or dismiss the application. He stated that the notice should indicate that if the voting system approval application has been pending a year or more then the Commission will deny the application if the voting system is not ready for approval. He asked if there was a statute that would permit the Commission to act accordingly.

The Chair recognized Mr. Simmons who indicated that there are two applicable statutory provisions. He stated that Indiana Code 3-11-15-8 states that an application under this chapter is valid for one year after the date that the application is filed and for any additional time that the Commission considers necessary. He added that Indiana Code 3-11-15-9 indicates that it is the duty of the applicant to vigorously and continuously seek approval of the voting system application. This section also indicates that the Commission may, after having a hearing that is subject to the Administrative Orders and Procedures Act, which would include notice to the vendor, dismiss the application if the Commission determines that the applicant has not complied with the requirement to vigorously and continuously seek approval of the application.

The Chair asked if anyone knew when the pending applications were filed and whether any of them were a year old. Mr. King responded that some of the pending applications are at least a year old.

Mr. Chavis asked how the two statutes could be read together. He stated he read the statutes as giving the applicant at least a year to pursue the application after which the Commission could consider dismissing the application for failing to pursue it diligently.

The Chair indicated that he read the statutes as saying that after a year the application is dismissed unless the applicant makes a specific showing to the Commission that the applicant is vigorously and continuously pursuing the application.

Mr. Long commented that perhaps the notice could take the form similar to an Indiana Trial Rule 41(E) motion to dismiss for failure to prosecute.

Mr. Long indicated that he would withdraw his prior motion and move that the Commission ask a voting system approval applicant whose application has been pending over a year to show cause at the next Commission meeting why the application should not be dismissed. He added that, if the application has been pending for less than a year then the applicant should give the Commission a status report including a description of a plan to pursue the application. Mr. Chavis seconded the motion. There being no further discussion, the Chair called the question, and declared that with four members voting “aye” (Mr. Burdick, Mr. Chavis, Mr. John, and Mr. Long), and no Commission member voting “no,” the motion was adopted.

The Chair asked Mr. Lee, attorney for Election System and Software, whether there was any word on the written clarification of the Wyle letter. Mr. Lee indicated that they had not yet received the written clarification.

9. Other Business

The Chair indicated that Mr. Long had mentioned an additional item to add to today’s agenda and he invited Mr. Long to describe the item.

Mr. Long indicated that it was his understanding that a candidate challenge was filed with the Election Division challenging the notice of candidate withdrawal in the Indiana House

District 46 case. A copy of the challenge was distributed to the Commission members for review.

The Chair stated that there has been a formal challenge filed by the Indiana Democratic Party. The Chair asked Mr. Simmons if he would provide some background on the law and procedure that applies with respect to the challenge.

Mr. Simmons indicated that this was his first opportunity to review the challenge. He stated that the document filed appears to be a purported challenge to a candidate withdrawal filed by Mr. Lee with respect to his candidacy in the House District 46 race. He stated that the statute referenced in the challenge, IC 3-8-7-28, provides deadlines for certain types of candidate withdrawals. He indicated that, pursuant to the state, a voluntary withdrawal must be filed no later than noon July 15 before a general election. He stated that the withdrawal filed with the Election Division indicated that Mr. Lee's withdrawal was filed under subsection (c) of this statute which provides that a candidate who has moved from the election district must file a notice of withdrawal immediately after changing the candidate's residence.

He stated with respect to procedure, the statute applicable to challenges filed with the Commission is IC 3-8-1-2. He stated that Commission has heard other challenges under this statute. He indicated that the challenge is made on a Commission-approved CAN-1 form. He stated that the challenge is for the specific purposes set forth in the statute. He said that the statute lists items that may be challenged, including for example, a declaration filed in a primary. He stated that the statute does not indicate that a withdrawal of candidacy is a document which is subject to challenge under the statute and the Commission would not have jurisdiction over a challenge to a withdrawal under this statute. He stated that, procedurally, he is not aware of a statute that provides the Commission the jurisdiction to consider the document filed as a challenge.

Mr. Long indicated that the challenger was present. He stated that his position would be that Mr. Lee could not have filed a form withdrawing his candidacy because the deadline has past. He stated that, had Mr. Lee done that, the Commission would have rejected the filing or treated it as a non-issue. He stated that Mr. Lee did file a form to withdrawal using a form that is the closest form approved by the Commission to accomplish the withdrawal for the reason that he has moved out of the district.

Mr. Long stated that the Commission now has a challenge stating that Mr. Lee has not moved out of the district and, if the challenge is true, then no ballot vacancy exists and any attempt to appoint a candidate to replace Mr. Lee should not be certified by either one of the Co-Directors until the issue is resolved. He stated that it was his belief that the dispute should be resolved as expeditiously as possible so that the Republican Party will, in fact, have a candidate if they wish to have a candidate in House District 46.

Mr. Long added that, if the Commission does not act on this matter now, and a candidate is certified to replace Mr. Lee, then a challenge will be filed as to the candidate selected to replace Mr. Lee. He stated that the challenge in that case could be filed because there is no vacancy to be filled. He stated that if the Republican Party attempts to fill the vacancy then

the Commission will have to come back for a hearing on the challenge and, by that time, the election may have come and gone.

Mr. Long indicated that the best way for the Commission to enforce the laws would be to set the matter for an evidentiary hearing as quickly as possible to resolve the issue. He stated that he didn't know if there was a procedure for withdrawing in the manner that Mr. Lee has attempted to do. He stated that he believed that Mr. Lee and his wife should be subpoenaed to come in to find out where they live. He stated that, according to the report he has, Mr. Lee is registered at the home of his business partner.

Mr. Long added that it may be that Mr. Lee and his business partner are going to shack-up together but he would like to know. He stated that he did not think a candidate could withdraw as a subterfuge and that Mr. Lee may have committed a crime by filing a false registration. He stated that according to the report from Mr. Bishoff, the Reverend Lee's wife had been asked where Mr. Bishoff should send them some item to make money, and if it should be sent to the address in Riley, which is in House District 46) and that Mrs. Lee had apparently said "yes."

Mr. Long stated that he does not think that Mr. Lee has moved. Mr. Long stated that he thinks that there is at least an issue as to whether Mr. Lee has moved or not. He asked Ms. Robertson about when voting starts. Ms. Robertson stated that absentee ballots that are delivered by mail will be sent September 30 and absentee voting in the clerk's office will begin October 4.

Mr. Long stated that the Republican Party is entitled to have a candidate and he thinks it would be most expeditious to deal with this issue by setting a hearing before the Commission as opposed to waiting. He indicated that it was his understanding the Republican Party had called a caucus for September 27 which means that the candidate will not be certified until September 28. He stated that there would surely be some reasonable period of time to file a challenge after the certification of the candidate. He stated that it was his understanding from past experience that the candidate is not a candidate until the Commission acts on the challenge.

Mr. John expressed his appreciation to Mr. Long for his concern about the Republican Party. He stated that his inclination in this situation would be to refer to the statute and, in doing so, he did not see a basis for Commission jurisdiction. He indicated that Mr. Long's points are valid and practical but he thinks the Commission would act *ultra vires* if it acts outside the statute. He explained that the statute sets forth a finite number of items that can be filed and challenged before the Commission. He stated that the item that could be challenged would be the certification that is filed after the caucus is conducted. He stated that, until that would happen, he thought the Commission would exceed its powers if it would proceed on the matter.

Mr. Long stated that his answer to Mr. John's position is that under IC 3-6-4.1-14(a)(1) the Commission has the authority to administer the election laws of the state, which is a pretty broad mandate. He stated that it has been brought to the Commission's attention that there may be someone who is attempting to circumvent the Indiana election laws. He stated that it is his belief that the Commission has an obligation under the election code that, when the

Commission has information that causes the Commission to have concern, that the Commission should move forward and subpoena person to appear before the Commission, a member of the Commission, or the Co-Directors, to be examined with regard to any matter which the Commission or the Co-Directors are charged with a duty. He indicted that he believes that the Commission's authority is so all-encompassing that it assigns to individual Commission members the authority to direct the issuance of subpoenas. He stated that he does not think the Commission even needs a quorum to do so under IC 3-6-4.1-7(b). He stated that this statute requires a quorum of the Commission to take official action other than to meet to take testimony. He said that he thinks that when the Commission has information that indicates a person may not be acting in conformity with the laws that the Commission is charged with administering, then the Commission has a statutory duty to inquire into the situation. He stated that, if the Commission does not inquire into the situation, then all the Commission is doing is ensuring that there will be a candidate challenge that will protract or interfere with the conduct of the election in the three of four counties in the district. He stated that he thought the Commission not only had the jurisdiction and power but also the duty to act on the issue.

Mr. John asked Mr. Long how he reconciled that position with IC 3-8-1-2 which specifically delineates the challenge procedure.

Mr. Long indicated that IC 3-6-4.1-21 indicates that if the Commission determines that there is a substantial reason to believe that an election law violation has occurred, then the Commission shall expeditiously make an investigation. He stated that he thinks the challenge that has been filed raises a substantial question as to the withdrawal that has been signed under oath on September 16. He stated that, according the affidavit of John Bishoff, filed today at 10:00 a.m. he went to 6344 South State Road 159 in Riley, Indiana and met with Mrs. Lee and she advised Mr. Bishoff that is where Mr. Bishoff should send the material for Mr. Lee. Mr. Long asked Ms. Robertson to identify the documents filed with the Commission.

Ms. Robertson stated that the first two documents were filed by Mr. Lee, a candidate withdrawal and an acknowledgement card from the voter registration office in Sullivan County. She explained that the next two documents were provided by the Republican Party and are documents indicating that the Republican Party has called a caucus to fill the vacancy.

The Chair recognized Dan Parker who identified himself as from the Indiana Democratic Party. Mr. Parker stated that what you will find is that when Mr. Lee registered at the Sullivan County license branch he put this purported address, which is the address of his business partner in his newest venture, and he put his previous address. Mr. Parker stated that this demonstrates that Mr. Lee didn't know where he lived because he, according to the Vigo County voter registration office, registered to vote on April 5 at 6344 South 159 which is the address that Mr. Bishoff visited today. He stated that clearly this is not his previous voter registration address since 6344 is. He argued that the voter registration form was invalid the only public document that exists that indicates that this is Mr. Lee's residence.

The Chair asked whether Mr. Lee filed a withdrawal form that says he moved out of the District. Mr. Parker said that he didn't move. Mr. Long stated that he filed a form under oath

on September 16 indicating that he wished to withdraw and indicated that his address is as follows and it doesn't indicate that Mr. Lee wishes to withdrawal because he has moved out of the district. He stated that, on its face, the withdrawal form is invalid because the withdrawal form was not timely filed. Mr. Long stated that he was not going to split hairs on this issue because he thinks that the address in Farmersburg listed on the withdrawal form is outside of House District 46.

The Chair recognized Ms. Robertson who stated that she had a staff member call both Sullivan County and Vigo County to fax a copy of the voter registration forms filed by Mr. Lee in both counties. Mr. Parker indicated that another significant point is that Mr. Lee registered on September 10.

Voting System Certifications (continued)

The Chair indicated he received a report that Election Systems and Software just received their letter on the iVotronic and that he was going to recess the meeting for a few minutes so that the letter could be retrieved and distributed to the Commission.

The meeting was recessed.

The Chair called the Commission to order. The Chair asked Mr. King to summarize the information obtained.

Mr. King stated that he has a fax from Dawn Bates, contracts manager, who is the author of the original letter from this Independent Testing Authority that the Commission has reviewed today with respect to the application to approve the iVotronic Firmware Version 9.0.0.0. He stated that the fax states that it is being provided as confirmation of the earlier conversation with John Groh requesting clarification of Wyle Laboratories letter number 48 dated September 17, 2004. He explained that the fax states, in one sentence contained in the fax: "The ES&S model iVotronic DRE and firmware release 9.0.0.0 are in compliance with the current 2002 voting system standards."

Mr. King explained that, after the fax was received, he, Ms. Robertson, and Mr. Simmons had a telephone conversation with Ms. Bates and reviewed the letter and asked her several questions. Mr. King invited Ms. Robertson to summarize the phone conversation.

The Chair recognized Ms. Robertson who stated that Ms. Bates indicated on the telephone that the voting system has been through full testing and meets the 2002 FEC voting system standards. She stated that Wyle Laboratories will be issuing a report and Ms. Bates speculated that it would be about three weeks before the full report would be issued. She stated that, with ES&S's release, Wyle Laboratories would agree to send the full report directly to the Election Division.

Mr. King stated that Ms. Bates was asked if there is ever a situation when the content of the report differs from what is contained in the cover letter. He stated that Ms. Bates indicated that the full report would not contradict the cover letter with respect to the voting system meeting 2002 FEC voting system standards but that the full report contains more detail about the tests conducted and the test findings in the full report. Mr. King stated that Ms.

Bates did not have control personally over when the full report would be issued but that she indicated that it would take, at most, three weeks.

The Chair moved that the Commission approve Election Systems and Software direct record iVotronic Firmware Version 9.0.0.0 as recommended by Co-Directors for a term to end October 1, 2005 as required by statute subject to Election Systems and Software filing the full Wyle Laboratory report with the Election Division within 30 days after the full report become available from Wyle Laboratories. Mr. Long seconded the motion. There being no further discussion, the Chair called the question and declared and with four members voting “aye” (Mr. Burdick, Mr. Chavis; Mr. John; and Mr. Long), and no members voting “nay”, the motion was adopted.

Other Business (continued)

The Chair indicted that the Commission would return to the challenge to the withdrawal of Jeffery M. Lee filed with the Commission today. The Chair invited Mr. Long to continue his comments on the case.

Mr. Long indicated that he foresaw a procedural quagmire ahead for this issue if the Commission fails to intervene to take action. He stated that, notwithstanding, the challenge has brought forward issues the Commission should investigate.

The Chair indicated that his views are formed by applying basic rules of statutory construction that the specific statutes control the general statutes. He stated that there is a specific statute that deals with the filings regarding candidacy and those filings which may be challenged. He added that the specific statute that deals with this issue does not mention that the current filing is subject to challenge. He stated that he appreciated Mr. Long’s position about the broader responsibility of the Commission to enforce the election law. He stated that IC 3-6-4.1-21 states that if the Commission determines that there is a substantial reason to believe an election law violation has occurred it shall expeditiously make an investigation. He stated that the simple filing of the challenge, in a hotly contested race, does not rise to the level of suggesting Commission action even if he accepted the argument that the Commission has such broad authority. He stated that he does not think he has the evidence to suggest a substantial reason to believe an election law violation has occurred.

He stated that he does not even believe that the Commission can get to that issue since he believes that the Commission does not have jurisdiction to proceed in this case. He stated that he believed that there are remedies available to those raising the issue in court. He stated that he appreciated that there may be some need to exhaust any potential remedy that they may have administratively but he did not believe that the matter was ripe for the Commission or proper for the Commission procedurally. He stated that the remedy available would be a remedy available in court.

Mr. Long stated that when the Commission has a hearing on the challenge of the certified candidate he fears the response to that challenge will be that there is insufficient time to address the challenge. He stated that if a certification is filed, and the Election Division does not sign-off on the candidate, then that candidate will not be on the ballot. Mr. Long stated

he knows that Commission members have been very loyal to Mr. LaPlante. He added that those members should not come to another meeting crying that there is insufficient time. He stated that he thought that Commission members were screwing their party in its chance to have a candidate on the ballot in House District 46. He stated that, as a Democrat, he hoped that the Commission would do nothing today because it just delays the matter. He stated that they have done the right thing by presenting it to the Commission in advance. He stated that, at this point, there will be a candidate challenge filed sometime after September 27 and people who are voting in these counties will not be voting for a Republican Party candidate because there will be no Republican Party candidate on the ballot.

Mr. John asked what election law violation has occurred under IC 3-6-4.1-21.

Mr. Long stated that an affidavit has been filed which indicates that Mr. Lee has not moved and Mr. Lee has filed an affidavit with this Commission indicating that he has and that is a violation of the election law. He stated that it is also a violation of the criminal law in that Mr. Lee has filed a false statement with the Commission and he has falsely registered in a county when he does not live. He stated that Mr. Lee's wife is also registered at the address in Vigo County where Mr. Lee really lives.

The Chair indicated that the Commission was not having a residency hearing.

Mr. Long indicated that Mr. John had asked which election law was violated.

Mr. John stated that the issues raised are for someone else for another day. Mr. John said that he did not see a substantial question raised at this time that persuades him that the Commission must do anything. Mr. John stated that he appreciated Mr. Long's concern with practical considerations. He stated that the statute specifically delineates what items may be challenged and the candidate withdrawal is not one of those items and he doesn't think the Commission has jurisdiction to do anything about it at this time.

The Chair indicated that what has been filed is a sworn statement that Mr. Lee lives at a certain place and a sworn statement filed by someone else that disputes Mr. Lee's statement. He stated that the Commission did not have jurisdiction to consider a challenge to the candidate's written withdrawal of his declaration of candidacy.

Mr. Long stated that if someone called up and said "they murdered us" then we would say we can't take that because you have to come down here and file a written report. Mr. Long stated that Commission members were taking care of Brooks and that's OK and he understands that and he can relate to that. He indicated that he used to get mad about it but he doesn't anymore since he has been beat down so much on it. He indicated that when the Republican Party doesn't have a candidate on the ballot and they run to court crying about it then they should remember they had an opportunity to have the matter addressed before the Commission and then Brooks can make his campaign contributions out the wazoo and file his reports or not and we'll go on down the road.

Mr. John asked about how to resolve the issue brought before the Commission.

Mr. Long moved to accept Mr. Lee's withdrawal of his candidacy. Mr. Chavis seconded the motion.

The Chair asked Mr. Simmons whether the withdrawal has already been accepted if it is filed. He explained that the withdrawal has been filed with the Election Division and that there is no statutory basis to accept or reject a candidate withdrawal filing. He stated that if there is a certification of a candidate to fill the vacancy then the Election Division will follow through with its ministerial duty to certify the vacancy candidate.

Mr. Long asked what would happen if someone gets certified to fill the vacancy and the Co-Directors don't act on it.

Mr. Simmons stated that the Election Division has been down that road in *Sammons v. Conrad*. He stated that he had reported that case to the Commission many times describing the procedural history and the result. He stated that he believed that the issue will be resolved in court. He stated that he believed that the only argument between the parties at today's hearing is how, procedurally, that dispute will be resolved. He stated that it could happen after an administrative hearing, or will, most appropriately in his view, go directly to court where it will be more expeditiously determined rather than having to go through an administrative hearing and then an appeal from that administrative hearing filed in court. He stated that he understood why someone would want to exhaust all of their administrative remedies in order to make sure that they were in a position to go to court.

Mr. Long stated that, if a challenge were to be filed, wouldn't that lead to a jurisdiction quagmire between the Commission and the courts. He asked whether the Commission would have jurisdiction over the challenge.

Mr. Simmons stated that the Commission would not have jurisdiction under the statute. He stated that there is a very specific statute that applies to challenges filed under IC 3-8-1-2. He stated that there is a deadline that applies to challenges to early candidate vacancies. He stated the statute provides that the deadline that applies to filing those challenges is August 20, which has passed.

Mr. Long asked whether a person who filled a vacancy on October 1 could not be challenged because the challenge deadline was on August 20 but at the same time that a person can file a false affidavit and he had to file it by July 15 but that is OK. He asked if it was because there is a D and an R issue.

Mr. Simmons asked if it was the issue with Mr. Long and he indicated that it was.

Mr. Long asked Mr. Simmons again if it was an issue with him.

Mr. Simmons responded that it was an issue with the statute. He stated that the reason that the statute might be that way is that, at this late date, it may be more expeditious to go to court as he had mentioned earlier.

Mr. Long stated that we would find out if that is so. He stated that this board was a bunch of eunuchs. He stated that he has never seen a bunch of people who behave in such a manner. He stated that you tried to save Brooks LaPlante Eleven Thousand Dollars (\$11,000) in fines

and he won't pay his fines and now he is trying to get back in and you are trying to help him again. He stated that he applauded you all.

Mr. John asked whether it was time to call the question. The Chair asked Mr. Long to restate the motion.

Mr. Long stated that he moved to accept the withdrawal of Mr. Lee.

Mr. John indicated that he would abstain from the vote because he did not think the Commission had the authority to do that.

There being no further discussion, the Chair called the question and declared and with two members voting "nay" (Mr. Long and Mr. Chavis), and two members abstaining (Mr. Burdick and Mr. John) the motion was not adopted.

Mr. Long stated that he supposed that meant that the resignation is not accepted.

The Chair indicated that he thought the resignation was accepted as a matter of law.

The Chair indicated that there was one other matter for the Commission to consider.

Mr. Long asked if the matter was on the agenda.

The Chair said it was not.

Mr. John stated that he had been puzzling over something and that Mr. Long may have solved the problem. He stated that there is a gentleman named John Miles and that he would move to direct the Co-Directors to initiate an investigation into Mr. Miles. Mr. John stated that Mr. Miles was quoted in a newspaper as saying that he has created a corporation and not a political action committee to avoid Indiana election laws. Mr. John stated that Mr. Miles indicates that he has raised Forty Thousand Dollars (\$40,000) that he hopes to use media campaigns.

Mr. John stated that, pursuant to IC 3-5-2-37, a political action committee is defined as any entity that is intending to influence an election and has either raised or spent more than One Hundred Dollars (\$100) to do so. He stated that the section excludes a corporation or labor organization that makes a contribution in accordance with IC 3-9-2 or makes an expenditure. He stated that, if you refer to IC 3-9-2, there is a Five Thousand Dollar (\$5,000) limit on contributions of corporations. He stated that Mr. Miles has made public statements that indicate that he has already violated campaign finance laws or is in the process of violating campaign finance laws and he believed that the Co-Directors should investigate the matter.

Mr. Long asked Mr. John if Mr. Miles had made the statements to Mr. John. Mr. Long asked how a newspaper story could give the Commission substantial reason to believe when a sworn affidavit does not.

Mr. John stated that he has seen Mr. Miles interviewed on television. Mr. John indicated that his issue with Mr. Lee's candidate withdrawal was jurisdictional and that the issue was not

ripe for Commission consideration. He stated that this is different in that there is a clear election law that has been violated. He stated that, in this case, there is an individual who has set up a corporation and who is going to spend more than the corporate limits to influence campaigns which is clearly a violation of the campaign finance laws. He stated that, in fact, it is a violation of the criminal campaign finance laws because he stated that he is raising money from multiple people and, under IC 3-14-1-11, if a person recklessly makes contributions in a name of another person, or knowingly accepts a contribution made in the name of another person, commits a crime. He stated that Mr. Miles proposes to take contributions and funnel them through a corporation according to his own statements.

Mr. Long asked who Mr. Miles was supporting.

Mr. John stated that, according to the newspaper articles, Mr. Miles plans to run newspaper ads critical of Mitch Daniels.

Mr. Long stated that he believed the Commission needed substantial reason to believe an election law violation has occurred. He stated that this was a “prior restraint” issue in that Mr. Miles may change his mind and decide not to violate the law. He stated that he would want something more than a newspaper article, like a sworn affidavit.

The Chair asked whether competing affidavits would be sufficient for Mr. Long, with one affidavit saying Mr. Miles is doing it and another affidavit stating that Mr. Miles is not doing it.

Mr. Long stated that it all comes down to one thing, that we have a Commission that won’t function on important issues.

Mr. John stated that his suggestion would be that since there are criminal violations the Commission should proceed.

Mr. Long stated that if the issue is a Republican Party oriented issue then apparently it is important and if it is a Democratic Party oriented issue then it is not important.

The Chair asked Mr. Long if that wasn’t Mr. Long’s premise.

Mr. Long stated that he had a deal at home where he would represent Republicans free of charge to challenge an ordinance in Boonville that prohibits political signs except when they are posted the last 30 days before the election. He stated that when the Commission is in a position to investigate all violations then he will be for it.

Mr. John indicated that he had a motion and the Chair recognized Mr. John for his motion.

Mr. John moved, seconded by the Chair, that the Co-Directors investigate the potential violations of John Miles. There being no further discussion, the Chair called the question and declared and with two members voting “aye” (Mr. Burdick and John) and two members voting “nay” (Mr. Long and Mr. Chavis), the motion was not adopted.

The Chair indicted that the mutual paralysis society continues. Mr. Long agreed.

D. Adjournment:

The Chair asked for any other business. There being no further business, Mr. John moved, seconded by the Chair, that the Commission adjourn. There being no further discussion, the Chair called the question and declared and with four members voting “aye” (Mr. Burdick, Mr. Chavis; Mr. John; and Mr. Long), and no members voting “nay”, the motion was adopted. The Commission then adjourned at 8:30 p.m.

Respectfully submitted,

J. Bradley King
Co-Director

Kristi Robertson
Co-Director

APPROVED:

Brian L. Burdick
Chairman